

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-222162 DATE: June 25, 1986  
MATTER OF: Ralph Construction, Inc.

## DIGEST:

1. protest that requirement for a diesel-powered street sweeper in a request for quotations issued under the small purchase procedures unduly restricts competition is timely where, before the date for receipt of quotations, the protester was orally advised by agency personnel that its quotation for a gasoline-powered sweeper would be evaluated and that the agency was primarily interested in performance of the sweeper, and the protest was filed within 10 days after the protester's quotation for a gasoline-powered sweeper was rejected.
2. Specification for a street sweeper powered by a diesel engine, rather than a gasoline engine, does not unduly restrict competition where the agency presents a reasonable explanation of why the specification is necessary to meet its minimum needs and the protester fails to show that the restriction is clearly unreasonable.
3. Claim for contract termination costs is a matter for resolution under the Contract Disputes Act of 1978, which establishes procedures for resolving such claims.

Ralph Construction, Inc., protests the award of a contract to Tymco Inc. for a street sweeper under request for quotations (RFQ) No. F08637-86-Q-0376, issued by the Base Contracting Division, Tyndall Air Force Base, Florida. Ralph contends that by limiting the procurement to sweepers having diesel engines, the specification unduly restricted competition. Ralph also maintains that the Air Force initially ordered its sweeper and that the agency's subsequent rejection of its quotation constituted a contract termination.

We dismiss the protest in part and deny it in part.

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The RFQ, issued on January 15, 1986, under the small purchase procedures, sought quotations for the 3-month rental of a Tymco model 600 regenerative sweeper to be tested for its ability to clear bomb-damaged runways. The RFQ included detailed specifications for the Tymco sweeper, one of which was that it must be powered by a Detroit diesel, 8.2-litre, 165-horsepower engine.

Only Ralph and Tymco, the awardee, submitted quotations by the February 12, 1986, closing date. After initial evaluation of proposals, the Air Force determined that Ralph had submitted the lowest acceptable quote. On the morning of February 14, the agency placed a verbal order with Ralph and stated that a confirming written order would be forthcoming. Shortly thereafter, upon receiving information from Tymco regarding Ralph's equipment, the Air Force questioned Ralph concerning its intent to furnish a diesel-powered sweeper. Ralph stated that it proposed to furnish a Tymco model 600 sweeper with a gasoline engine. The Air Force then rejected Ralph's quotation as nonresponsive and awarded the contract to Tymco on February 18. Ralph's protest to this Office followed.

Ralph contends that the requirement that the sweeper have a diesel engine unduly restricts competition. Ralph maintains that the type of engine powering the sweeper is immaterial because the awardee will be required to make all repairs except for minor maintenance. Before submitting its quotation, Ralph called the test project officer, identified in the RFQ as the responsible individual at the using activity, the Small Center Test Facility at Tyndall. The protester told the project officer that it had a gasoline-powered sweeper and wanted to submit a quotation. According to Ralph, the project officer replied that the type of engine was not a material requirement of the procurement. The protester states that it also told Air Force contracting officials about the discussion with the project officer and the fact that its sweeper has a gasoline engine.

The Air Force contends that the protest is untimely under our Bid Protest Regulations, which require that protests based upon alleged improprieties in an RFQ that are apparent before the closing date for receipt of initial quotations be filed with either the contracting agency or our Office by the closing date. 4 C.F.R. § 21.2(a)(1) (1986); see ELCOM, Inc., B-209103, July 12, 1983, 83-2 CPD ¶ 80.

Here, Ralph questioned the agency official responsible for use of the equipment before submitting a quotation. The official concerned states that he told Ralph that performance of the sweeper was the agency's primary concern and that if Ralph wanted to submit a proposal, the Air Force would evaluate it. The project officer states that he specifically said that he did not know the extent to which performance of the sweeper would differ with the type of engine and denies that he agreed to accept a gasoline engine. The protester, however, apparently believed that its engine would be acceptable.

The small purchase procedures are less formal than the usual requirements for government procurement, for example, they permit oral requests for quotations. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 13.106 (1985). Unlike other solicitations, Form DD 1155 (82 SEP), used for requests for quotations for small purchases, does not warn that oral explanations or instructions will not be binding upon the agency. Compare Inventive Packaging Corp., B-213439, Nov. 8, 1983, 83-2 CPD ¶ 544. In view of Ralph's discussions with agency personnel, we believe that Ralph was not required to protest formally the specification of a gasoline engine in order to be timely in its protest concerning rejection of its quotation, and we will consider the matter.

When a protester alleges that specifications unduly restrict competition, the procuring agency bears the burden of presenting prima facie support for its position that the restrictions are necessary to meet its actual minimum needs. This requirement reflects the agency's obligation to create specifications that permit full and open competition to the extent consistent with the agency's actual needs. 10 U.S.C.A. § 2305(a)(1) (West Supp. 1985). The determination of the government's minimum needs and the best method of accommodating those needs are primarily matters within the contracting agency's discretion. Bataco Industries, Inc., B-212847, Feb. 13, 1984, 84-1 CPD ¶ 179. Consequently, once the agency establishes support for the challenged specifications, the burden shifts to the protester to show that the specifications in dispute are clearly unreasonable. Information Ventures, Inc., B-221297, Mar. 10, 1986, 86-1 CPD ¶ 234.

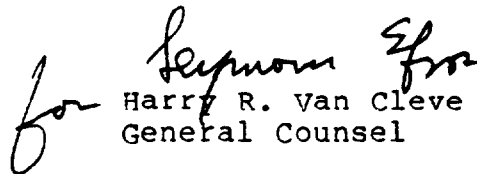
The procurement record filed by the Air Force establishes that from the initiation of the procurement, the agency desired to lease a Tymco sweeper with a diesel engine because those sweepers currently are being purchased by the Air Force for runway repair. The Air Force would have used one of its own sweepers to test its ability to clear bomb-damaged runways if one had been available. The purpose of the test is to evaluate the performance of current Air Force sweepers, and the Air Force contends that it is particularly interested in testing a diesel engine fueled with JP-4 jet aircraft fuel, which may be the only type available in a combat environment. To accomplish this, the agency appears to have adopted the identical description used in prior purchases of the sweepers for the RFQ in this instance.

We believe that the Air Force has established that its restriction of the sweeper to one powered by a diesel engine is reasonable. The protester asserts that the Air Force justification was not set forth in the RFQ; that the agency insufficiently documented that all sweepers in its inventory are diesel-powered; and that diesel engine and gasoline engine sweepers have the same performance characteristics. There is no requirement that a justification for specifications be included in solicitations, and we find that the documents in the record clearly establish that the Air Force desired to test the type of sweepers now being included in the Air Force inventory. The mere assertion that the two types of sweepers perform identically is insufficient to establish that the Air Force requirement is clearly unreasonable. Big Joe Mfg. Co., B-219223, Sept. 16, 1985, 85-2 CPD ¶ 291.

Ralph alternatively contends that the verbal notification of award on February 14 created a binding contract, and the Air Force's subsequent rejection of its quotation amounted to a breach of this contract or a termination for the convenience of the government. Unless the contract is reinstated, Ralph asserts, it is entitled to recover its termination costs and the costs for pursuing this protest. One cost claimed by Ralph is \$945.51 incurred in preparing its machine for shipment pursuant to a request by agency officials, in connection with the verbal notification of award, that Ralph accelerate the delivery schedule.

We dismiss Ralph's claim for contract termination costs. All claims against the government relating to express and implied contracts are subject to the Contract Disputes Act of 1978, 41 U.S.C. § 601-613 (1982), which establishes procedures for resolving such claims. See The Bartow Group-Architects, B-220300, Oct. 7, 1985, 85-2 CPD ¶ 387.

The protest is dismissed in part and denied in part.

  
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General Counsel